Petition

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No. _____

THE SUPREME COURT OF THE UNITED STATES

October, 1981 Term

NATHANIEL DENMAN, Petitioner,

vs.

WILLIAM BULGER, individually and as President of the Massachusetts Senate and Chairman of the 1980 Constitutional Convention; JACK BACKMAN, individually and as a State Senator; and EDWARD J. KING, individually and as Governor of Massachusetts, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

Nathaniel Denman,
Petitioner, pro se
Box 689
Falmouth, MA 02541

AC 617 548-3295

A. QUESTION PRESENTED FOR REVIEW

WHETHER THE MASSACHUSETTS CONSTITUTIONAL CONVENTION SHALL BE RECONVENED BY THE GOVERNOR, AS DIRECTED BY THE MASSACHUSETTS CONSTITUTION'S AMENDMENT 81, WHENEVER THE CONVENTION FAILS TO TAKE FINAL ACTION ON CONSTITUTIONAL AMENDMENTS PROPERLY BEFORE IT, AND WHETHER SUCH MANDATORY RECONVENING SHOULD TAKE PLACE NUNC PRO TUNC, AFTER THE TERM OF THE LEGISLATURE COMPRISING THE CONSTITUTIONAL CONVENTION EXPIRES.

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C. TABLE OF AUTHORITIES

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D. REPORTS OF THE DECISIONS BELOW

The decision of the U. S. District Court for the District of Massachusetts is not reported. The decision in Denman v. Bulger, ____ F. 2d ____ is not yet reported; the slip opinion is printed in the Appendix.

E. GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The Memorandum and Order of the United States Court of Appeals for the First Circuit summarily affirming the judgment of the U. S. District Court was dated September 2, 1981, and entered the same date. The mandate was issued on September 23, 1981.

2. Title 28, United States Code, Sec. 1254 is believed to confer on this Court jurisdiction to review the mandate of the U. S. Court of Appeals.

F. CONSTITUTIONAL PROVISIONS, U. S. STATUTES, AND MASSACHUSETTS CONSTITUTIONAL PROVISION INVOLVED.

1. THE FOURTEENTH AMENDMENT, SECTION I

ART. XIV. SECT. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. TITLE 42, U. S. CODE

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

3. CONSTITUTION OF MASSACHUSETTS, AMENDMENT LXXXI

Art. LXXXI. SECTION 1. Article XLVIII of the Amendments to the Constitution is hereby amended by striking out section 2, under the heading "THE INITIATIVE. *IV. Legislative Action on Proposed Constitutional Amendments.*", and inserting in place thereof the following: —

Section 2. Joint Session. — If a proposal for a specific amendment of the constitution is introduced into the general court by initiative petition signed in the aggregate by not less than such number of voters as will equal three per cent of the entire vote cast for governor at the preceding biennial state election, or if in case of a proposal for amendment introduced into the general court by a member of either house, consideration thereof in joint session is called for by vote of either house, such proposal shall, not later than the second Wednesday in May, be laid before a joint session of the two houses, at which the president of the senate shall preside; and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the governor shall call such joint session or continuance thereof.

C. STATEMENT OF THE CASE

Amendment 81 of the Massachusetts Constitution provides that the Governor shall call call the reconvening of the joint session of the Legislature sitting as the Constitutional Convention whenever the Constitutional Convention fails to take final action on proposed Constitutional Amendments before it.

On November 12, 1980, twelve proposed Amendments to the Massachusetts Constitution had been voted on favorably by the Convention twice. A third, and final, vote was required in order that the proposed Amendments become part of the Constitution or be rejected. Instead of voting on the 12 proposed Amendments, the Convention, led by respondent Bulger, the President of the Senate, adjourned.

Respondent Governor King refused to order the reconvening of the Convention, and the 12 proposed Amendments did not become part of the Constitution. Unless the situation was corrected by the U. S District Court under Title 42, U S C, Sections 1983 and 1988, the people of Massachusetts would have to wait at least two more two-year sessions of the Legislature before final action could be taken on the proposed Amendments.

Petitioner Denman, a proponent of the proposed Amendments, feeling that he and the other proponents had been invidiously discriminated against because the opponents of the proposed Amendments had been favored unconstitutionally by the respondents' actions in adjourning the Convention and refusing to reconvene, a denial of due process of law, brought suit in the U S District Court under 42 USC Sections 1983 and 1988, asking that if the Governor did not reconvene the Convention, that a Master be appointed to do so, and that if the Chairman of the Convention, Respondent Bulger, refused to call for the

final action required by Amendment 81, a Master be appointed by the District Court to do so. Denman relied on Title 28, Sections 1331 and 1343, for jurisdiction of the District Court.

The District Court allowed, on March 20, 1981, the Motion to Dismiss for failure to state a claim upon which relief could be granted. Denman took a timely appeal, which was summarily disposed of on September 2, 1981.

H. ARGUMENT

WHETHER THE MASSACHUSETTS CONSTITUTIONAL CONVENTION SHALL BE RECONVENED BY THE GOVERNOR, AS DIRECTED IN THE MASSACHUSETTS CONSTITUTION'S AMENDMENT 81, WHENEVER THE CONVENTION FAILS TO TAKE FINAL ACTION ON CONSTITUTIONAL AMENDMENTS PROPERLY BEFORE IT, AND WHETHER SUCH MANDATORY RECONVENING SHOULD TAKE PLACE NUNC PRO TUNC, AFTER THE TERM OF THE LEGISLATURE COMPRISING THE CONSTITUTIONAL CONVENTION EXPIRES.

Historically, as shown by the number of Amendments of the Massachusetts Constitution, the Massachusetts Legislature, sitting as the Constitutional Convention, has frequently attempted to evade the will of the voters of Massachusetts duly expressed in the rather conservative due process of law required to improve the Massachusetts Constitution by amendment.

When faced with the Hobson's choice of approving, on the third vote, three Amendments desired by the voters, calling for the abolishment of the Governor's Council, a new death penalty provision, and the prohibition of unpublicized, rapidly-passed legislative pay raises or voting down these Amendments and incurring the wrath of the voters who had just rejected a legislative pay raise by a nine-to-one margin in the last election ballot, the legislators chose to adjourn. The effect of the adjournment

was to postpone for at least four years (two two-year terms of the legislature) the proposed Amendments.

The Governor refused to reconvene the legislature, since he is a Democratic Governor, and the Governor's Council is composed wholly of Democrats.

This procedure denied proponents of all twelve proposed Amendments the equal protection of the law, because the opponents of these measures gained their desired ends when the 12 Amendments went down to defeat by inaction. If the legislators had been brave enough to vote the Amendments down, the proponents could have attempted to have them removed from office for the unpopular vote. This drastic remedy is not required, however, since this Court, in Baker v. Carr, 82 S. Ct. 691, 369 US 186, ruled that when voters are denied the equal protection of the law by a legislature that refuses to reapportion itself, the voters can, relying on 42 USC Sec. 1983, seek the federal remedy.

Likewise, when voters are denied due process of law (and certainly Amendment 81 of the Massachusetts Constitution is due process of law), they may resort to the federal remedy. The Court of Appeals for the First Circuit held, however, that petitioner Denman received due process when the "proposals were given at least preliminary consideration." The Constitution of Massachusetts, however, states that Denman, and the other voters of Massachusetts who patiently perfected the tedious procedures for amendment of the Constitution, are entitled to "final action" on the measures amending the Constitution. "Preliminary" consideration only is not "final action" and therefore is not due process.

This Court can have a salutory effect on the Massachusetts legislative process by reversing the decision of the Court of Appeals, and ordering this matter back to the District Court, where that court

can fashion relief by ordering the defendant, Governor King, to reconvene the Constitutional Convention, nunc pro tunc, and vote these Amendments into the Constitution, or into limbo.

That such a salutory effect is needed is shown by the recent behavior of the Legislature. This Court can take judicial notice that the Massachusetts Legislature, in its displeasure because the Springfield Housing Court would not accept its candidate as Clerk of that court, attempted to combine the independent housing court with other courts of Massachusetts, and when the State Senator representing Springfield protested, he was summarily ejected from the State Senate by Respondent Bulger, the President of the State Senate and Chairman of the Constitutional Convention that he adjourned so cavalierly.

On due process and equal protection grounds, this Court should grant this petition, or summarily reverse the decision of the court below, and return the matter to that court for action consistent with the 14th Amendment's guarantees.

By the petitioner, pro se

Nathaniel Denman

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NATHANIEL DENMAN, Plaintiff C. A. No. 80-2740-C-Z

v.

WILLIAM BULGER, individually, and as President of the Massachusetts Senate and Chairman of the 1980 Constitutional Convention; JACK BACKMAN, individually and as a Massachusetts Senator; and EDWARD J. KING, individually and as Governor of Massachusetts, Defendants.

VERIFIED COMPLAINT

1. Plaintiff brings thisaction to enforce his rights under the Constitution of the United States and its First and Fourteenth Amendments; the Constitution of Massachusetts and its 48th, 74th, and 81st Amendments; and Title 42, US Code, Secs. 1983, 1985, 1986 and 1988. This Court has jurisdiction under Title 28, US Code, Secs. 1331 and 1343. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

2. Plaintiff Denman is a citizen of the United States and of Massachusetts, and resides in Falmouth, Mass. Defendant William Bulger, hereinafter "Bulger", is, and was during all times set forth herein, the duly elected and acting President of the Massachusetts Senate and Chairman of the 1980 Massachusetts Constitutional Convention; defendant Jack Backman is, and was during all times set forth herein, a Massachusetts State Senator, duly elected and serving in that office; and defendant Edward J. King, hereinafter "King"is, and was during all times set forth herein, the duly elected and serving Governor of Massachusetts.

3. The 81st Amendment of the Massachusetts Constitution provides, among other things, that "If a proposal for a specific amendment of the constitution

is introduced into the general court by initiative petition ... or ... by a member of either house, such proposal shall, not later than the second Wednesday in May, be laid befoe a joint session of the two houses, at which the president of the senate shall preside; and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the governor shall call such joint session or continuance thereof." (Emphasis added.)

4. On Nov. 12, 1980, the following twelve proposed Amendments to the Massachusetts Constitution had been voted on twice by the Constitutional Convention, presided over by defendant Bulger,and were ready for final action, a third vote:

House No. 475 Residency Requirements
" " 555 Local Approval
" " 907 Abolishing the Council
" " 2060 Limiting General Court Sessions
" " 2744 Voter Approval of Bonds
" " 3289 Legislative Pay Raise
" " 3373 Recall of Elected Officials
" " 3515 Restricting New Taxes
" " 3587 Protection of Children
" " 5913 Beautification of Highways
" " 5015 Burden of Taxes
Senate No. 979 Provision for Capital Punishment

5. Later on Nov. 12, 1980, defendant Bulger, who had a personal interest in preventing the wish of the people of Massachusetts concerning limitations of future legislative pay raises from becoming a part of the Massachusetts Constitution, and defendant Bachman, who had a personal interest in preventing the will of the people of Massachusetts concerning the establishment of a death penalty from becoming a part of the Massachusetts Constitution, conspired to cause, and caused, the adjournment of the said Convention without taking "final action", a third

vote, on the 12 proposed Amendments listing in Para. 4 above, which third vote was part of the custon or usage of the general court of Massachusetts.

6. After the above-described adjournment, and continuing to the present date, Dec. 3, 1980, defendant King has failed and refused to call for the continuance of the Constitutional Convention as required by the Massachusetts Constitution.

7. The actions of the defendants described above have made the plaintiff sick, causing him mental pain and anguish, and deprived him of the benefits of government by his duly-elected state officers under the Constitutions of the United States and Massachusetts. His state government has been held up to ridicule and scorn and he is threatened, as are the remainder of the residents of, and visitors to, Massachusetts, with deprivation of the benefits of peaceful, democratic constitutional government for another two-year term of the Legislature if the behavior of the defendants is not corrected and punished.

WHEREFORE, plaintiff requires that this Court:

A. Issue preliminary and permanent injunctions, requiring defendant King to refrain from further disobedience of the Massachusetts Constitution, and restraining defendants Bulger and Backman and their agents, associates, employees, successors, and coconspirators from further disobedience of the Massachusetts Constitution, or conspiring to disobey said Constitution, on pain of having this Court replace each defendant with appointed receivers empowered to replace each of the defendants until the provisions of the Massachusetts Constitution concerning Amendments thereto are carried out to the satisfaction of the plaintiff;
B. Award plaintiff $12,000 compensatory damages, and $24,000 punitive damages, from the defendants, jointly and severally;

C. Award plaintiff his costs and disbursements in this action, including a reasonable sum in lieu of attorneys' fees; and

D. Make any other Orders as may be found just in the circumstances.

The above statements are made under the penalty of perjury, this date, Dec. 3, 1980.

Leave to file complaint granted,
Ryan D. Zobel, J. 12/5/80

"MANDATE" Filed Sept. 23, 81

No. 81-1290 UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NATHANIEL DENMAN, Plaintiff, Appellant v. WILLIAM BULGER, ET AL., Defendants, Appellees.

BEFORE COFFIN, Chief Judge, CAMPBELL AND BOWNES, Circuit Judges.

MEMORANDUM AND ORDER
Entered September 2, 1981

Plaintiff, Nathaniel Denman, was the proponent of twelve amendments to the 1980 Massachusetts Constitutional Convention. He filed suit against three state officials contending that the Convention was allowed to adjourn without any "final action" being taken on his proposals as required by Massachusetts Constitutional provisions. The complaint, which requested both an injunctive and monetary remedy, was dismissed for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6).

We agree with the district court that the allegations of the complaint presented no basis to grant the requested relief. Accepting as true the complaint's factual allegations we fail to see how the

failure to take the stated action,[1] in and of itself violated anyof the rights listed by plaintiff. Because the complaint makes clear that plaintiff was not in any way impaired or hindered in submitting his proposals, and that these proposals were given at least preliminary consideration, we can identify no First Amendment or due process claims. "The First Amendment right to associate and to advocate 'provides no guarantee that a speech will persuade or that advocacy will be effective.'" Smith v. Arkansas State Highway Employees, 441 US 463, 464-65 (1979). For this same reason the allegations of the complaint also do not effectively implicate the right to vote. Once plaintiff had the opportunity to submit his proposals he simply could not demand that they would successfully be accepted or acted upon.

The judgment of the district court is summarily affirmed. First Circuit Rule 12.

By the Court: /s/ Dana H. Gallup,
Clerk

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1. This is assuming Massachusetts law required the formalities invoked. All indications appear to be to the contrary. See Opinion of the Justices, 334 Mass. 745, 758-59, 135 N.E.2d 741, 749 (1956).